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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL RODRIGUEZ, Plaintiff and Appellant, v. CARL HARRIS et al., Defendants and Respondents.	E048562 (Super.Ct.No. RIC488865) O P I N I ON

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge. Affirmed.

Ackerman, Cowles & Associates, Richard D. Ackerman and Michael W. Sands, Jr. for Plaintiff and Appellant.

Fagen Friedman & Fulfrost, Christopher D. Keeler and Leslie A. Reed for Defendants and Respondents.

I. INTRODUCTION

This appeal is related to another appeal between the same parties in case No. E046162.[1] In the underlying litigation, plaintiff Michael Rodriguez, a member of the Board of Education (the Board) of Jurupa Unified School District (JUSD), sued the respondents in this appeal, JUSD's superintendent, Elliott Duchon, and the president of the Board, Carl Harris, as well as JUSD itself. He alleged the Board's investigation into allegations of sexual harassment and a decision to publicly censure him violated his federal and state constitutional rights to due process and equal protection. He also alleged certain biblical references made by Harris in connection with the censure violated the establishment clauses of the California and federal Constitutions.

Harris and Duchon moved to strike Rodriguez's complaint as a strategic lawsuit against public participation, or anti-SLAPP motion, pursuant to Code of Civil Procedure section 425.16. The trial court deemed the motion to be directed at only the causes of action concerning the establishment clauses. The court then granted that motion. (That ruling is before us in the related appeal.)

Rodriguez subsequently filed a first amended complaint (FAC), which adds additional allegations and omits the establishment clause claims.[2] Harris and Duchon

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[1] We take judicial notice of the record filed with this court in *Rodriguez v. Jurupa Unified School District et al.*, case No. E046162.

In September 2009, we informed the parties that the two cases would not be consolidated, but that we would consider the two appeals together and allow argument on the two cases to be held concurrently.

[2] In their briefs on appeal, both sides refer to the trial court's sustaining, with leave to amend, Harris and Duchon's demurrer to the causes of action that remained

[footnote continued on next page]

filed a second anti-SLAPP motion, this time addressing each of the causes of action. Following a hearing, the court granted the motion. Rodriguez appealed. Reviewing the court's ruling de novo, we affirm.

II. FACTUAL SUMMARY AND PROCEDURAL HISTORY

A. *Factual Summary*[3]

Between December 2005 and July 2006, Rodriguez allegedly engaged in inappropriate workplace conduct, including making sexually-charged comments, inappropriate physical contact, and threats against JUSD employees. In response to the allegations, JUSD hired the law firm of Gresham Savage Nolan & Tilden (the investigators) to investigate the employees' claims. On September 27, 2006, the investigators informed Rodriguez of the inquiry and offered him an opportunity to respond to the allegations. He was told he could meet with an investigator on October 2, 2006, or provide a response to the allegations in writing, or both.

[footnote continued from previous page]
following their anti-SLAPP motion. However, our record on appeal does not reflect this event.

[3] Rodriguez's statement of facts in his opening brief relies entirely upon citations to his FAC. In opposing an anti-SLAPP motion, however, a plaintiff may not rely upon the mere allegations of an unverified complaint. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.) In the argument portion of his opening brief, Rodriguez refers us to his declaration filed in opposition to the earlier anti-SLAPP motions and requests that we take judicial notice of the declaration. Harris and Duchon do not object to the request. We therefore base our factual summary primarily upon the portions of Rodriguez's declaration filed in the related appeal to which objections were not sustained.

After learning of the investigation, Rodriguez retained counsel to represent him. Through counsel, Rodriguez informed the investigators that he was in the midst of a contested school board election and asked the investigators to delay the investigation. He informed them he would cooperate with the inquiry "at the appropriate time." Rodriguez added that he believed the investigation was instigated by Duchon to punish Rodriguez for voting against Duchon's contract and that he had suffered damage to his reputation as a result of rumors about the investigation that caused the loss of two key endorsements in his race.

Through its legal counsel, JUSD acknowledged Rodriguez's retention of counsel and agreed to pay Rodriguez's legal costs associated with the investigation. JUSD requested a copy of the fee agreement between Rodriguez and his counsel.

Approximately one week later, after reviewing the fee agreement, JUSD told Rodriguez the agreement was unclear as to the scope of the engagement between Rodriguez and the attorney and informed Rodriguez that JUSD would only pay for "legal fees and costs related to legal representation on matters directly related to [JUSD]'s ongoing internal investigation of the sexual harassment claims . . . ."

On October 6, 2006, a lawyer with the investigators informed Rodriguez that although he appreciated "Rodriguez's concerns about the investigation proceeding so close in time to a school board election, . . . the Board of Directors . . . has a duty by law and policy to investigate all allegations of workplace discrimination or harassment that are brought to its attention. Politics cannot require an employer to postpone or delay its

legal duties." The lawyer acknowledged that Rodriguez was not obligated to cooperate with the investigation, but urged him to make himself available for an interview or to provide his written responses to the allegations. He offered the dates of October 9 or 10, 2006, to meet with Rodriguez. The lawyer acknowledged Rodriguez's request for a copy of the investigator's file, but stated that they generally do not release such information to individuals who are subjects of the investigation.

On October 8, 2006, Rodriguez again told the investigators that he would only meet "at the appropriate time," and added that such a time would necessarily not be until after the election. Rodriguez reiterated his belief that the investigation was timed to hurt him in the election, noted the delay between the alleged acts and the beginning of the investigation, and once again asked for a delay, noting that he couldn't "imagine that a delay of less than a month [would] affect [the] investigation."

On October 12, 2006, Rodriguez informed the investigators that The Press-Enterprise intended to run a story on his alleged inappropriate acts. Rodriguez asked for assurances that the investigators maintain confidentiality.

On October 13, 2006, the investigators told Rodriguez they needed to proceed with the investigation and noted that very little time had elapsed between JUSD becoming aware of the alleged acts and the beginning of the investigation. The investigators stated their understanding that Rodriguez was declining to participate in the investigation because of the upcoming election and would assume that he would generally deny all allegations. They also informed Rodriguez that they would make

themselves available to him if he chose to cooperate after they concluded their investigation.

On October 20, 2006, Harris, as president of the Board, sent a letter to Rodriguez noting that the investigators had finished their inquiry and they had concluded that Rodriguez had unlawfully harassed at least two of the employees. Harris further noted that although Rodriguez had refused to cooperate with the investigation, the Board would consider allowing him to cooperate later. Finally, Harris asked Rodriguez to participate in sensitivity and sexual harassment training and an anger management program, and to recuse himself from all personnel matters involving certain employees who participated in the investigation.

On October 25, 2006, Rodriguez requested a copy of all information related to the investigation pursuant to the California Public Records Act. (Gov. Code, § 6250 et seq.) JUSD subsequently turned over certain documents responsive to the request, but withheld other documents based upon the attorney-client privilege and attorney work product doctrine.

On October 27, 2006, JUSD's lawyer informed Rodriguez's lawyer that the investigation was complete, and that JUSD would not pay for any charges that accrued after the receipt of the letter, or for any charges that were not directly related to the investigation. JUSD's lawyer added: "Should Mr. Rodriguez choose to participate at a later date in the investigation, please contact me so that we can discuss legal representation at that time."

On November 1, 2006, Rodriguez's counsel told the investigators that Rodriguez would make himself available for an interview. The investigators responded by proposing the date of November 4, 2006, for the interview. Our record does not include any response to this proposal.

On November 21, 2006, JUSD's lawyer told Rodriguez's lawyer: "[I]t is imperative to promptly schedule a meeting between [JUSD] and Mr. Rodriguez (and their respective attorneys) to discuss the findings and implementation of [JUSD]'s directives. Without this meeting, the Board has determined that it may be necessary to make its findings and directives public so as to protect [JUSD] and its employees." Rodriguez's attorney responded with a promise to "get back to you as soon as I hear from Mr. Rodriguez." It does not appear from our record that Rodriguez's counsel responded further regarding the scheduling of a meeting or that JUSD ever interviewed Rodriguez in connection with the investigation. Rodriguez subsequently retained new counsel.

On January 2, 2007, JUSD published a meeting agenda that included consideration of a resolution to censure Rodriguez for "Unacceptable Conduct." The same day, Rodriguez, through his new counsel, asked JUSD to remove the resolution from the agenda and alleged that any attempt to censure Rodriguez would both violate Rodriguez's due process rights and defame Rodriguez's character.

The resolution was not taken off the agenda. Following extensive debate on the resolution—including a lengthy speech by Rodriguez—the Board voted three to two to censure Rodriguez.

Following the censure, Harris removed Rodriguez from Board committee assignments. According to Rodriguez, this "effectively rendered [him] unable to carry out many of [his] constitutional duties as a [B]oard member." He further asserts he has been excluded from financial decisions about employee pay and benefits and from the hiring committee and "completely silenced by HARRIS and his supporters on the Board." Finally, he asserts various improprieties concerning meetings on January 22, 2008, and January 28, 2008, pertaining to decisions made concerning the defense of his lawsuit.

B. *Rodriguez's FAC*

Rodriguez filed his FAC in August 2008. We summarize the essential factual allegations as follows: Based upon false and defamatory allegations of sexual harassment against Rodriguez, JUSD (at the request of Harris and Duchon) commenced an investigation of Rodriguez; the investigation was not confidential, neutral, unbiased, or objective; the investigators were hired to find sexual harassment and paid to produce a report that would conclude that Rodriguez did something wrong; JUSD agreed to pay for Rodriguez's attorney, but subsequently stopped paying for, and eventually fired, his attorney; JUSD's investigators refused to turn over evidence to his attorney and falsely claimed the investigation was complete on October 16, 2006; the investigation process did not comply with JUSD's policies regarding sexual harassment claims; Harris and Duchon caused the Board to consider a motion to censure Rodriguez; following the censure of Rodriguez, Harris removed him from all committee assignments, effectively

rendering him unable to carry out his duties as a Board member; he has also been excluded from any decisions regarding employee pay and benefits; Harris and Duchon have kept information regarding hiring decisions from Rodriguez and have meetings in violation of the Ralph M. Brown Act;[4] Harris and Duchon "appear to have orchestrated the systematic removal of Latino/Hispanic administrators from key positions within JSUD," and Rodriguez has complained about such actions; the sexual harassment investigation is retaliation for his comments regarding racial discrimination in District hiring and employee retention policies; Duchon and Harris have created an atmosphere where minority and other employees fear for their job security and are afraid to speak out on issues that concern them; and Harris and Duchon are involved in an effort to recall Rodriguez and have unlawfully used District resources for such efforts.

He alleged the following four causes of action relevant here: (1) "Declaratory Relief"; (2) "Violation of Due Process Clause of the California Constitution"; (3) "Violation of 42 U.S.C.A. § 1983"; and (4) "Violation of Equal Protection." (Capitalization omitted.)[5]

Among other relief, Rodriguez seeks: unspecified injunctive relief; declaratory relief; costs and attorney fees; damages under title 42 United States Code section 1983 (§ 1983); the appointment of a receiver, special master, or referee to prevent the waste of

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[4] Ralph M. Brown Act (the Brown Act). (Gov. Code, § 54950 et seq.)

[5] Rodriguez also alleges a cause of action for "Disclosure of Private Facts." This cause of action is asserted against unnamed defendants only.

public funds; a writ of mandate "as may be appropriate to the facts of this case"; an order preventing the investigators or the law firm that represented JUSD during the investigation from representing JUSD in this litigation; an order precluding Harris and Duchon from participating in Board meetings concerning this litigation; and "other appropriate relief."

C. *The Anti-SLAPP Motion*

Harris and Duchon filed their anti-SLAPP motion in October 2008. The motion was made pursuant to Code of Civil Procedure section 425.16 and "on the grounds that the allegations arise out of Defendants' furtherance of the exercise of their right to petition or free speech under the State and Federal Constitutions in connection with an issue of public interest, and because [Rodriguez] cannot meet the burden of establishing a probability of success as to any of the causes of action set forth in his FAC."

Following a hearing, the trial court granted the motion. The court found that defendants made a prima facie showing their conduct was protected by Code of Civil Procedure section 425.16. The court also concluded that Rodriguez "did not meet his burden of showing that his [FAC] and evidence in support thereof is legally sufficient to sustain a favorable judgment based upon a probability of success analysis."

III. ANALYSIS

A. *Anti-SLAPP Principles and Standard of Review*

The anti-SLAPP statute, Code of Civil Procedure section 425.16, provides, in part: "A cause of action against a person arising from any act of that person in furtherance of

the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[6] (Code Civ. Proc., § 425.16, subd. (b)(1).) The word "person" as used in Code of Civil Procedure section 425.16, subdivision (b) includes government entities. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114.)

The statute was enacted "to prevent and deter 'lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought '"to prevent SLAPPs by ending them early and without great cost to the SLAPP target"' [citation]. [Code of Civil Procedure s]ection 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit

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[6] Rodriguez has requested that we take judicial notice of a 2009 amendment to Code of Civil Procedure section 425.16, which added subdivision (c)(2) to the statute, and certain legislative committee reports concerning the amendment. The amendment limits the ability of a defendant who prevails on an anti-SLAPP motion to recover attorney fees and costs if the cause of action was brought pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.), the Bagley-Keene Open Meeting Act (*id.*, § 11120 et seq.), or the Brown Act (*id.*, § 54950 et seq.). (Code Civ. Proc., § 425.16, subd. (c)(1).) Harris and Duchon oppose the request. To the extent Rodriguez is asking us to take judicial notice of statutory language, we grant the request. (See Evid. Code, §§ 451, subd. (a) [court must take judicial notice of public statutory law of this state], 459, subd. (a).) We decline the request as to the legislative committee reports. Finally, although we take judicial notice of the statutory amendment, we agree with Harris and Duchon that the statutory amendment is irrelevant to the issues before us.

using a summary-judgment-like procedure at an early stage of the litigation. [Citation.] In doing so, [Code of Civil Procedure] section 425.16 seeks to limit the costs of defending against such a lawsuit. [Citation.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

The statute establishes a "two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; Code Civ. Proc., § 425.16, subd. (b)(1).)

"[I]n order to establish the requisite probability of prevailing [citation], the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations.] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citations.] [¶] Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP,

subject to being stricken under the statute." (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89.)

On appeal, we independently review the evidence supporting both prongs of the analysis. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 [Fourth Dist., Div. Two].)

B. *Ability to File Second Anti-SLAPP Motion*

Before addressing the merits of the anti-SLAPP motion, we address an argument by Rodriguez that Harris and Duchon should not be permitted to file a second anti-SLAPP motion.

As set out above, Harris and Duchon filed an anti-SLAPP motion with respect to Rodriguez's original complaint, which the trial court deemed to be directed at only the establishment clause claims. The trial court granted that motion as to these claims. Rodriguez thereafter filed his FAC. Rodriguez contends Harris and Duchon should be precluded from filing a second anti-SLAPP motion. According to Rodriguez, allowing "serial" anti-SLAPP motions will allow a party to "piecemeal their anti-SLAPP motions in order to recover double attorneys fees against the other party." This, he believes, "seems fundamentally unfair and unjust especially when the grounds for the second anti-SLAPP motion were present at the time of the first." Rodriguez acknowledges that there is no authority for this argument and says it is a matter of first impression.

Initially, we note that Rodriguez did not assert this argument below. It has thus been forfeited on appeal. (See *Franz v. Board of Medical Quality Assurance* (1982) 31

Cal.3d 124, 143 ["Appellate courts generally will not consider matters presented for the first time on appeal."].)

Even if the argument had been asserted below, we conclude it is without merit in this case. Rodriguez suggests that a defendant could file an anti-SLAPP motion against a single cause of action, then, after prevailing on the first motion, file a second motion against a different cause of action, and so on, thereby multiplying the cost of litigation for the plaintiff. Even if this tactic were theoretically possible, it is not likely as a practical matter. An anti-SLAPP motion must "be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Code Civ. Proc. § 425.16, subd. (f); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 7:951, p. 7(II)-35.) This time constraint would generally permit only one anti-SLAPP motion to be filed and heard; by the time the first motion is heard, the 60-day period within which a second motion could be filed will likely have passed.

Here, Harris and Duchon filed a second anti-SLAPP motion, but they could do so only because Rodriguez filed an amended complaint. (See *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313-315 [the 60-day period applies to amended complaints].) Just as a defendant may file successive demurrers to successive amended pleadings, we perceive no unfairness or abuse per se in the filing of a second anti-SLAPP motion in response to an amended pleading.

Moreover, if a defendant was filing serial anti-SLAPP motions for the nefarious purpose suggested by Rodriguez, the tactic would likely be viewed as sanctionable under Code of Civil Procedure section 128.7. Under this statute, the attorney submitting a motion certifies that the motion is not presented for the primary purpose of harassment, delay, or to increase the cost of litigation. (Code Civ. Proc., § 128.7, subd. (b)(1).) If it is, the court may impose a sanction "sufficient to deter repetition of [such] conduct or comparable conduct by others similarly situated." (*Id.*, subd. (d).) There is thus a remedy for the possible abusive use of anti-SLAPP motions that concerns Rodriguez. It is not applicable here.

We now turn to the merits of the appeal.

C. *First Prong: Defendants' Threshold Showing That Rodriguez's Claims Arose from Protected Activity*

"The preliminary inquiry in an action like that before us is to determine exactly what act of the defendant is being challenged by plaintiff. In doing so we review primarily the complaint, but also papers filed in opposition to the motion to the extent that they might give meaning to the words in the complaint." (*Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 849; see Code Civ. Proc., § 425.16, subd. (b)(2).) The reach of the anti-SLAPP statute is to be "construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) "[A] plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and unprotected activity under the label of one 'cause of action.'" (*Fox Searchlight Pictures, Inc. v.*

Paladino (2001) 89 Cal.App.4th 294, 308, fn. omitted.) "The 'principal thrust or gravamen' of the claim determines whether [Code of Civil Procedure] section 425.16 applies. [Citation.] [¶] . . . where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to [Code of Civil Procedure] section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct. [Citations.]" (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103; see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.)

The allegations set forth in Rodriguez's FAC and the evidence submitted in connection with the motion to strike are summarized above. In essence, he asserts defendants violated his federal and state constitutional rights to due process and equal protection, as well as unspecified "First Amendment" rights, by the manner in which the investigation of his alleged sexual harassment of JUSD employees was conducted and by the resulting public censure of him by the Board.

Code of Civil Procedure section 425.16 identifies four protected classes of speech and action: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).) In the first and second of these categories, "the statute requires simply *any* writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body. . . . Under the plain terms of the statute it is the context or setting itself that make the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.)

The gravamen or basic thrust of Rodriguez's causes of action is that the public censure and the related investigation violated various constitutional rights. Many of the actions that give rise to Rodriguez's suit took place at public board meetings; those that did not occurred in the course of the investigation that led to this public debate and Rodriguez's public censure. As such, his claims are easily encompassed within the first two statutory categories of protected activity. As noted in *Briggs*, any writing or statement related to an issue being reviewed by an official proceeding is covered under these first two clauses. Accordingly, we agree with the trial court that the claims arise out of protected activity under the anti-SLAPP statute.

D. *Second Prong: Probability of Prevailing on the Merits*

1. Due Process

Rodriguez alleges in his second cause of action for violation of due process under our state Constitution that he "had a property right in the continued representation by counsel during the sexual harassment investigation." In his third cause of action, for damages under § 1983, Rodriguez alleges a similar violation of the federal constitutional right to due process because defendants "retained and fired counsel for [him] at a critical stage of the proceedings against [him] while continuing to retain and pay counsel for Defendants."

The due process clause of the Fourteenth Amendment prohibits "any State" from depriving "any person of life, liberty, or property, without due process of law[.]" (U.S. Const., 14th Amend., § 1.) The California Constitution similarly provides that a "person may not be deprived of life, liberty, or property without due process of law[.]" (Cal. Const., art. I, § 7, subd. (a).)[7] "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Property protected by due process encompasses more than real estate, chattels, or money; it may also include acquired interests in specific benefits. (*Board of Regents of State Colleges v. Roth* (1972)

[7] Although California courts do not recognize a cause of action to recover monetary damages for a violation of California's due process clause, a cause of action alleging such a violation is permitted to obtain a writ of mandate or declaratory or injunctive relief. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 326, 329.)

408 U.S. 564, 571-572, 576 (*Roth*).) To have a property interest in a benefit protected by due process, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (*Id.* at p. 577.) The interest must stem from "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Ibid.*) "Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process." (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 207.) "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." (*Town of Castle Rock, Colo. v. Gonzales* (2005) 545 U.S. 748, 756; accord, *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 853 (*Las Lomas*).)

Rodriguez relies heavily on the United States Supreme Court's decision in *Roth*. In that case, an untenured professor of a state university was told he would not be rehired for the next academic year. (*Roth, supra,* 408 U.S. at p. 566.) He was not given a reason for the decision or an opportunity to challenge it at a hearing. (*Id.* at p. 568.) The professor believed the decision was made to punish him for making statements critical of the university administration and therefore violated his right to freedom of speech. (*Ibid.*) He sued the Board of Regents of the university claiming that the failure to give him notice of a reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law. (*Id.* at p. 569.) In rejecting the claim, the Supreme

Court explained: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' [Citations.] In such a case, due process would accord an opportunity to refute the charge before University officials." (*Id.* at p. 573.) The court noted that the "purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." (*Id.* at p. 573, fn. 12.) The court concluded that such a hearing was not required in the case before it because "there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake." (*Id.* at p. 573.)

Initially, we note that Rodriguez does not appear to be asserting on appeal the theory expressed in his FAC that he has a "property right" to counsel at public expense. Indeed, he does not refer us to any statute, JUSD rule, or other authority that could support "a legitimate claim of entitlement to" publicly provided counsel in this situation. (See *Roth, supra,* 408 U.S. at 577.) Instead, it appears that he is asserting, based on *Roth*, that the sexual harassment investigation put his good name, reputation, honor and integrity at stake, thus entitling him to notice and "an opportunity to refute the charge[.]"

He contends he did not get this opportunity because Harris and Duchon "terminated [his] defense counsel mid way through the investigation[.]"[8] He further contends that due process required the investigators "to turn over essential investigative materials" to him and that he was entitled to "a list of the witnesses against him in the proceedings." We disagree.

When procedural due process is required, the person whose liberty or property is subject to deprivation by the government is entitled to "notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." (*Boddie v. Connecticut* (1971) 401 U.S. 371, 378, fn. omitted; accord, *Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 557-558.) As our state Supreme Court has explained: "In determining applicable due process safeguards, it must be remembered that 'due process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.]" (*People v. Ramirez* (1979) 25 Cal.3d 260, 268.)

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[8] Rodriguez characterizes JUSD's decision to discontinue paying for his counsel as a decision to terminate his counsel. The evidence submitted, however, indicates that Rodriguez hired his own counsel, that JUSD subsequently agreed to pay for the investigation related expenses of the attorney, then later discontinued the payments once it deemed the investigation complete. The evidence does not, therefore, support Rodriguez's view that JUSD terminated his counsel.

Here, Rodriguez was not accused of a crime or terminated from his employment. The proceedings were concerned with the adoption of a resolution to censure Rodriguez for "unacceptable conduct." At the Board meeting where the resolution was discussed, Harris, as president of the Board, explained that adoption of the "resolution is not a formal legal finding and its adoption would not diminish Mr. Rodriguez's rights as a Trustee." Under these circumstances, Rodriguez was, at most, entitled to notice of the censure resolution and an opportunity to refute the allegations and clear his name. (See *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.) It is clear from the evidence that he was given such notice and opportunity. He was informed of the allegations, offered multiple opportunities to meet with JUSD's investigators with counsel present, given notice of the meeting at which the Board would consider the resolution, and provided ample opportunity to be heard on the matter at the Board meeting prior to the vote on the resolution. There is nothing in *Roth* or any other authority cited by Rodriguez that supports his assertion that due process entitled him to counsel at JUSD's expense, to the investigators' materials, or a "list of the witnesses against him."

Rodriguez also contends the use of investigators who are paid by JUSD violates due process under *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (*Haas*). We disagree. In *Haas*, the California Supreme Court held that a county government practice of hiring temporary administrative hearing officers to make adjudicative decisions violated due process. (*Id.* at pp. 1020, 1037.) The court explained that

unilaterally selecting and paying such officers on an ad hoc basis when "the officer's income from future adjudicative work depends entirely on the government's goodwill" created a pecuniary interest requiring disqualification. (*Id.* at p. 1024.) The court concluded: "The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the goodwill of frequent litigants who pay the adjudicator's fee." (*Id.* at p. 1037.)

Hass is easily distinguished. The potentially biased administrative hearing officers in *Haas* were adjudicators. Due process, the court stated, "requires fair adjudicators in courts and administrative tribunals alike." (*Haas, supra,* 27 Cal.4th at p. 1024, fn. omitted.) The investigators in this case were just that: investigators. There is nothing in the record to suggest the investigators were hired to act or acted as adjudicative decision makers in any way. At the conclusion of their investigation, the investigators provided the Board with "an oral report," after which the Board "determined that there is evidence that [Rodriguez's] actions constituted unlawful gender-based harassment against at least two of the complainants . . . ." Nothing in *Haas* suggests that due process precludes a government entity from hiring a third party to conduct an investigation into allegations of sexual harassment.

Under the circumstances appearing from our record, therefore, Rodriguez has not satisfied his burden of establishing a probability of success on his due process claims.

2. Equal Protection

Rodriguez's equal protection claims are based primarily upon allegations that the Board investigated the complaints of sexual harassment against him but did not investigate a complaint of sexual harassment against a female employee of JUSD. He also relies upon defendants' alleged failure to investigate his complaint about the circulation among Board members of an off color comical photograph of former President Bill Clinton and Hillary Clinton. He further contends that Harris and Duchon "treated [him] differently than [themselves] in regards to being represented by an attorney during the sexual harassment investigation."[9] As we explain below, Rodriguez has failed to satisfy his burden of showing a probability of success on these claims.

Our state and federal Constitutions prohibit the state from denying any person equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. 1, § 7, subd. (a).) The essence of equal protection is that persons who are similarly situated with respect to the legitimate purpose of the law receive like treatment. (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "Equal protection challenges typically involve claims of discrimination against an identifiable class or group of persons. The United States

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[9] In his FAC, Rodriguez alleges additional facts in support of his equal protection claims. He alleges, for example, that he is "the subject of invidious discrimination because of his ethnic origin, race, creed, and other immutable characteristics under law," and that he was not treated the same as "similarly situated [B]oard members" during Board meetings. Because he does not make or support similar arguments on appeal, we do not consider them. (See *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [points not presented in opening brief are deemed abandoned or waived].)

Supreme Court in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 . . . , however, held that a plaintiff who does not allege membership in a class or group may state a claim as a '"class of one."' [Citation.]" (*Las Lomas, supra,* 177 Cal.App.4th at p. 857.) A "'class of one' equal protection claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment." (*Id.* at p. 858; see also *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605.)

"The rational basis test is extremely deferential and does not allow inquiry into the wisdom of government action. [Citation.] A court must reject an equal protection challenge to government action 'if there is any reasonably conceivable state of facts that could provide a rational basis for the [difference in treatment]. [Citations.]' [Citations.] 'Where there are "plausible reasons" for [the] action, "our inquiry is at an end." [Citation.]' [Citation.] Under the rational basis test, courts must presume the constitutionality of government action if it is plausible that there were legitimate reasons for the action. In other words, the plaintiff must show that the difference in treatment was '"so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."' [Citation.] Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable." (*Las Lomas, supra,* 177 Cal.App.4th at pp. 858-859.)

Rodriguez's claim that the Board failed to investigate a complaint of sexual harassment made against one of his female accusers is based upon a written complaint made by someone whose name is redacted from the copy in our record. The complainant states that the alleged female harasser "made inappropriate physical contact with" the complainant; specifically: "She approached me and stood in close physical proximity to me, making me uncomfortable. She then grabbed my hand and held it, against my wishes and without my consent. I was compelled to excuse myself in order to disengage from her unwanted touching. She has also hugged me." The accuser also allegedly "made inappropriate remarks in the past. For example, in our first meeting she told me that she was separated from her husband and that we should do lunch sometime. I politely said no thank you. I pulled out the pictures of my family in my wallet, and said what are we here to talk about? She said she just wanted to touch bases with me." According to Rodriguez, this complaint was never investigated.

Harris and Duchon point out that the uninvestigated alleged harasser is an employee of JUSD; Rodriguez, by contrast, is a Board member, not an employee. As a nonemployee, they assert, Rodriguez was not entitled to employment based protections and is not subject to employment termination. As such, they argue that Rodriguez is not similarly situated to the other alleged harasser. Rodriguez contends this is a meaningless distinction for equal protection purposes because both he and the alleged harasser are agents and representatives of JUSD subject to the same antiharassment policies. Even if we agree with Rodriguez on this point, the nature of the complaints against Rodriguez—

which involved numerous acts of alleged harassing conduct directed at four different women—is clearly of a more serious nature than the conduct asserted against the female alleged harasser. In light of the deference we must attribute to JUSD's decision to investigate Rodriguez and to not investigate the other complaint, we conclude that Rodriguez has failed to satisfy his burden of showing a probability of success on this claim.[10]

Rodriguez's claim that defendants treated him differently by failing to investigate an alleged "overt sexual harassment/hostile work environment" is based upon the distribution to Board members of a sexually suggestive photograph of former President Clinton and Hillary Clinton. The photograph shows the former President appearing to help a dog stand on its hind legs; the dog's nose is near former President Clinton's waist; Mrs. Clinton is looking at the dog; above her, a word bubble is overlaid to make it appear that she is saying the words, "Let's name her Monica." Rodriguez asserts that he called for an investigation regarding the photograph, but nothing was done. Such evidence does not support an equal protection violation. Neither the evidence nor Rodriguez's argument indicates how he was similarly situated to whoever it was that distributed the photograph. Moreover, the distribution of the humorous photograph is patently dissimilar to the allegations made against Rodriguez of inappropriate physical contact

[10] In addition, we note that the evidence submitted by Rodriguez does not connect Harris or Duchon to any decision not to investigate the other alleged harasser. Rodriguez merely points to the redacted claim of harassment and states that the accused "was NEVER investigated."

with, and sexually suggestive comments directed against, four women. There thus appears to be a rational basis for treating Rodriguez and the distributor of the photograph differently.

Finally, Rodriguez claims he was treated differently from Harris and Duchon in that JUSD "unilaterally and arbitrarily terminated" his counsel but continued to provide counsel for Harris and Duchon. The claim is without merit. First, although JUSD was represented by counsel during the investigation, there is no evidence that Harris and Duchon were separately represented by attorneys or, if they were, that JUSD paid their fees. Second, as noted above, JUSD never *terminated* Rodriguez's attorney; at most, it stopped paying for his attorney's work once JUSD considered the investigation complete. Third, and most importantly, even if JUSD's counsel is considered Harris and Duchon's counsel, paying their attorney fees and discontinuing payment of Rodriguez's attorney fees does not violate equal protection because the parties are not similarly situated: Rodriguez was being investigated for sexual harassment, Harris and Duchon were not. Rodriguez has therefore failed to satisfy his burden of showing a probability of success on this claim.

3. Section 1983

In his third cause of action, Rodriguez seeks damages under § 1983 for the deprivation of his federal constitutional right to "due process and political rights[.]" "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (*Albright v. Oliver* (1994) 510 U.S.

266, 271, quoting *Baker v. McCollan* (1979) 443 U.S. 137, 144, fn. 3; accord, *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 297.) Although Rodriguez's FAC alleges numerous acts purporting to support this claim, on appeal he does not assert any argument in support of his § 1983 claim apart from the alleged constitutional violations discussed above. Because we hold he has failed to show the probability of success as to such violations, he has also failed to show a probability of success as to his § 1983 claim.[11]

4. Declaratory Relief

Rodriguez alleges 18 separate controversies he contends require judicial determination.[12] The gist of the claims are that defendants' acted unlawfully with respect to the handling of the sexual harassment investigation, the support of a recall election against him, and their treatment of him in Board proceedings. In his opening brief on appeal, Rodriguez does not assert any argument specifically addressing his declaratory relief cause of action or mention this claim in any argumentative heading. We may

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[11] Harris and Duchon assert they are immune from damages under § 1983 based upon the Eleventh Amendment to the federal Constitution, as well as pursuant to the doctrines of qualified immunity and legislative immunity under federal law, and discretionary immunity under California law. Because we conclude that Rodriguez has failed to establish a probability of success on the underlying substantive claims, we need not consider these arguments.

[12] Our record includes a request for dismissal filed by Rodriguez's counsel in which he requests dismissal of the allegation in one of the paragraphs of his declaratory relief cause of action. That allegation is: "'Whether HARRIS violated the First Amendment by using explicit religious references in a public proceeding aimed at punishing Plaintiff for unfounded allegations against him.'" Our record does not indicate whether this request was granted.

therefore treat his appeal as to that claim abandoned. (See *Tan v. California Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 800, 811 [Fourth Dist., Div. Two]; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) However, we also agree with Harris and Duchon's argument that Rodriguez does not have standing to pursue his declaratory relief claims.

Harris and Duchon rely primarily on *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793 (*Carsten*) and *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 (*Holbrook*). In *Carsten*, plaintiff Arlene Carsten was one of five members of the Psychology Examining Committee of the Board of Medical Quality Assurance (PEC). (*Carsten, supra,* 27 Cal.3d at p. 795.) The PEC has the statutory obligation to insure that only qualified individuals practice psychology in California. (*Ibid.*) Over Carsten's dissenting vote, a majority of the PEC voted to use a certain examination for a portion of the test administered to applicants. (*Id.* at p. 796.) Carsten asserted that the new exam was contrary to a statutory requirement and petitioned for a writ of mandate to compel the PEC to comply with the statute. (*Id.* at pp. 795-796.) The trial court sustained the PEC's demurrer and the Supreme Court affirmed.

The Supreme Court explained that because Carsten was not seeking a psychology license or in danger of losing a license as a result of the new rule, she was "not a beneficially interested person within the meaning of the statute" authorizing writs of mandate. (*Carsten, supra,* 27 Cal.3d at p. 797; see Code Civ. Proc., § 1086.) The court also rejected Carsten's argument that she had standing as a taxpayer. Although the court

acknowledged that "there are circumstances under which a citizen-taxpayer may compel a governmental instrumentality to comply with its constitutional or statutory duty" (*Carsten, supra,* at p. 797), it held "that a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits" (*id.* at p. 801). The court's holding was based on policy grounds: "Unquestionably the ready availability of court litigation will be disruptive to the administrative process and antithetical to its underlying purpose of providing expeditious disposition of problems in a specialized field without recourse to the judiciary. Board members will be compelled to testify against each other, to attack members with conflicting views and justify their own positions taken in administrative hearings, and to reveal internal discussions and deliberations. Litigation—even the threat of litigation—is certain to affect the working relationship among board members. In addition, the defense of lawsuits brought by dissident board members—and such suits would undoubtedly be frequent—will severely tax the limited budgetary resources of most public agencies. [¶] From the vantage point of the judiciary such litigation has ominous aspects. It is purely and simply duplicative, a rerun of the administrative proceedings in a second, more formal forum. The dissident board member, having failed to persuade her four colleagues to her viewpoint, now has to persuade merely one judge. The number of such suits emanating from members on city, county, special district and state boards, will add significantly to court calendar congestion." (*Id.* at p. 799.)

In *Holbrook*, two members of the Santa Monica City Council filed a petition for writ of mandate and complaint for declaratory relief claiming that the city council's meetings violated certain constitutional and statutory provisions. (*Holbrook, supra,* 144 Cal.App.4th at p. 1245.) They alleged that meetings frequently ran late into the night and provided for public comment as the final order of business, thus forcing the public to wait so long and stay so late to address the city council that the public was deprived of its fundamental right to address their local representatives. (*Id.* at pp. 1245-1246.) They sought a writ of mandate and injunction compelling the council to end its meeting by 11:00 p.m. (*Id.* at p. 1246.) The City of Santa Monica responded by filing a demurrer and an anti-SLAPP motion, asserting that the plaintiff did not have standing to sue. (*Ibid.*) The trial court sustained the demurrer and granted the motion. (*Id.* at p. 1245.) The Court of Appeal affirmed.

The Court of Appeal began by noting that, under *Carsten*, members of a public entity forfeit their citizen-taxpayer standing right. (*Id.* at p. 1251.) The court then addressed whether the plaintiffs had a beneficial interest in the matter. The plaintiffs asserted that they had "'a beneficial interest in the competent exercise of their rights and duties as public officials and in a safe and healthy workplace.'" (*Ibid.*) Working 20-hour days on meeting days, they argued, "creates an unhealthy and unsafe working environment," hampering the performance of their official duties. (*Id.* at pp. 1251-1252.) The court rejected the argument, explaining that the plaintiffs failed to "demonstrate any beneficial interest on [their] part . . . that differs from the general interest of all citizens in

the effective and legal operation of their governmental entities." (*Id.* at p. 1253.) The court concluded: "As no beneficial interest in the workings of a government entity is conferred by serving on that entity, [plaintiffs] have not established any beneficial interest sufficient to confer standing." (*Id.* at p. 1254.) The court further held that the plaintiffs were not interested persons for purposes of seeking declaratory relief under the Brown Act. (*Id.* at pp. 1255-1259.) Relying extensively on the policy reasons set forth in *Carsten*, the court agreed "that citizen standing is not a weapon to put in the hands of dissatisfied public officials seeking a new venue for advocacy; that the courts must not become a body to hear what would amount to legislative appeals; and that permitting this kind of citizen lawsuit would be incompatible with the official's acceptance of public office and detrimental to the separation of powers." (*Holbrook, supra,* at p. 1259.)

We agree with Harris and Duchon that these authorities preclude Rodriguez's declaratory relief claims. Declaratory relief requires "an actual controversy that is currently active . . . and both standing and ripeness are appropriate criteria in that determination." (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 563.) Here, Rodriguez alleges 18 separate controversies he contends require judicial determination. Although some of these alleged controversies are phrased in terms of determining whether *his* constitutional rights were violated by JUSD, the gist of the claims are that defendants acted unlawfully with respect to the handling of the sexual harassment investigation, the support of a recall election against him, and their treatment of him in Board proceedings. He seeks, for example, declarations as to whether

defendants: "have the right to expend and/or waste public funds in supporting the present recall election against [him]"; "have the right to continually prevent [him] from participating in JUSD Board Committee proceedings and processes as a punishment for a 'censure' of [him]"; "conducted a fair and neutral process in investigating the allegations of sexual harassment against [him]"; "must provide a neutral hearing process in the future with respect to the allegations made against [him]"; "violated Due Process principles when they retained and fired counsel for [him]"; and "are currently engaged in a systematic pattern of discrimination against Latino Board members and employees of the District[.]" Such alleged controversies are, in essence, issues that concern "the interest of the public in the orderly and competent exercise of government, not a personal interest distinct from that of the public." (*Holbrook, supra,* 144 Cal.App.4th at p. 1245.) Indeed, Rodriguez expressly alleges that the "resolution of these controversies is in the public interest within the meaning of the law." Although he further alleges he has been damaged as a result, we believe that he has not alleged a sufficient personal interest in the alleged controversies to support the actual controversy requirement necessary to state a cause of action for declaratory relief.

IV. DISPOSITION

The judgment is affirmed. Rodriguez shall pay Harris and Duchon's costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Miller
J.